SUPREME COURT OF NEW JERSEY

NO. 58,430

JALIYAH MUHAMMAD	:	ON APPEAL FROM THE
	:	SUPERIOR COURT OF
	:	NEW JERSEY,
Plaintiff-Appellant	:	APPELLATE DIVISION
	:	
v.	:	DOCKET NO. A-0558-04T3
	:	
COUNTY BANK OF	:	
REHOBOTH BEACH,	:	
DELAWARE; EASY CASH;	:	
TELECASH; and MAIN	:	
STREET CORPORATION	:	
	:	
Defendants-	:	
Respondents	:	
	:	

SAT BELOW:
HON. HOWARD H. KESTIN, PJAD
HON. STEVEN L. LEFELT, JAD
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BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than 3 million businesses and organizations of all sizes. Many of the Chamber's members, constituent organizations, and affiliates have adopted as standard features of their business contracts provisions that mandate the arbitration of disputes arising from or related to those contracts. They use arbitration because it is a prompt, fair, inexpensive, and effective method of resolving disputes with consumers and other contracting parties.

In this case, appellant Jaliyah Muhammad joins a growing (and disturbing) bandwagon of parties who seek to avoid arbitration agreements by use of state-law unconscionability principles. If this Court were to nullify the arbitration agreement at issue here on unconscionability grounds, it would wreak havoc on countless arbitration provisions in contracts entered into by the Chamber's members. Such an outcome would be gravely troubling because the business community has substantially relied on arbitration provisions - indeed, businesses have structured millions of contractual relationships around them - in light of the U.S. Supreme Court's consistent endorsement of arbitration over the past several decades as a favored means of dispute resolution. Thus, the Chamber has a strong interest in explaining why this Court should hold thatthe arbitration agreement at issue here is enforceable.

PRELIMINARY STATEMENT

Although Muhammad and her *amici* raise a litanychallenges to the parties' arbitration agreements, in this brief we focus on a subset of those attacks that are especially important to the business community as a whole.

1. Because of its importance to businesses and consumers in New Jersey and throughout the nation, we initially focus on the question whether a court may rely upon a requirement that arbitration proceed on an individual basis to invalidate an arbitration provision. See Muhammad Br. 16-24 (arguing that class waiver renders arbitration agreements unconscionable). There are a number of reasons why a court may not do so. To begin with, we agree with respondents (collectively "County Bank") that because the prohibition on class actions is contained in a provision of Muhammad's contracts that is separate from the arbitration provision and would by its terms apply not only in arbitration but also in court, the question of the enforceability of that waiver of class actions is reserved for an arbitrator to decide. But even if this Court were to reach the issue, neither New Jersey nor Delaware unconscionability law supports the invalidation of class waivers. Indeed, a holding that the class waiver in this case is unconscionable would necessitate distorting New Jersey (and Delaware) unconscionability law. Consequently, such a holding would be expressly preempted by Section 2 of the Federal Arbitration Act ("FAA"), *9 U.S.C.* § 2, which specifies that arbitration provisions may be invalidated only on the basis of state-law principles that apply neutrally to all contractual provisions. Such a holding also would be impliedly preempted by the FAA because conditioning the enforceability of arbitration provisions on the availability of class arbitration would strongly discourage the inclusion of such provisions in contracts.

2. Muhammad also argues that the Court should give no weight to County Bank's offer to pay the full costs of arbitration and to submit to individual arbitration before the American Arbitration Association, which she had suggested in her trial-court briefing is a preferable forum to the National Arbitration Forum (the arbitration provider designated in her contracts). As we explain below, numerous

courts around the country have held that offers by a company to waive challenged features of an arbitration provision moot challenges to the enforceability of the arbitration provision based on the waived features. This practice is eminently sensible: it ensures that customers will resolve disputes in an arbitral forum (as they have agreed to do), thereby effectuating the federal policy favoring the enforcement of arbitration provisions.

2. Muhammad's reliance on policy challenges to "payday lending" as a basis for invalidating her arbitration agreement is an improper diversion because she is not entitled to attack the validity of the underlying contract in this proceeding. As the U.S. Supreme Court made clear nearly four decades ago, an arbitration agreement is separable from the remainder of a contract, and its enforceability must be determined independently from an analysis of any challenge to the contract as a whole.

3. Finally, in resolving the issues in this case, the Court should reject the hostility to standard form contracts that so evidently underlies Muhammad's arguments. Form contracts of the sort involved here are critically necessary to the modern economy. As a consequence, any rule that categorically impairs the enforceability of form contracts would have devastating implications for both businesses and consumers.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Plaintiff-appellant Jaliyah Muhammad entered into three short-term loan agreements (so-called "payday loans") with County Bank. As part of these contracts, Muhammad agreed to arbitrate her disputes with County Bank. Muhammad v. County Bank *of Rehoboth Beach, Del.*, 379 *N.J. Super.* 222, 229 (App. Div. 2005). Muhammad's

contracts also contained a separate provision under which she agreed not to pursue or participate in class actions. Id.

Notwithstanding her contractual agreements, Muhammad filed a putative class action lawsuit in Superior Court against respondents, alleging violations of the New Jersey Consumer Fraud Act, New Jersey's racketeering statute, and New Jersey's usury laws. See id. at 230-31. County Bank removed the case to federal court and moved to compel arbitration. The federal court remanded to state court without ruling on the arbitration motion. Thereafter, County Bank again moved to compel arbitration under Muhammad's agreements. The superior court granted County Bank's motion, rejecting Muhammad's arguments that her agreements to arbitrate are unconscionable.

Muhammad sought and was granted leave to appeal to the Superior Court, Appellate Division. The Appellate Division affirmed, rejecting Muhammad's arguments that the arbitration provision and the class action prohibition are unconscionable. It also concluded that Muhammad's criticisms of the National Arbitration Forum's (NAF) dispute-resolution procedures lacked merit. *Id.* at 241-44.

Judge Kestin concurred in the result, explaining that because County Bank had offered to make the American Arbitration Association available as. a forum for Muhammad to pursue her claims, he would not have "consider[ed] any of plaintiff'sarguments addressed to the validity of NAF's arbitration procedures." *Id.* at 249.

This Court granted Muhammad's motion for leave to appeal. 185 *N.J.* 254 (2005).

LEGAL ARGUMENT

Muhammad's challenges to the enforcement of her arbitration agreements are imbued with the hostility towards arbitration that the Federal Arbitration Act was enacted eight decades ago to nullify. Not only do her arguments give short shrift to the federal and New Jersey policies favoring arbitration; they also inappropriately invoke her merits arguments (wholly unrelated to arbitration) to distract this Court from those policies and the resultant necessity of enforcing arbitration agreements.

Rather than duplicating County Bank's arguments, in this brief we make several related but distinct points to demonstrate to this Court why the decision of the Appellate Division was correct, and why requiring these parties to arbitrate is important to the business community generally.

I. AN AGREEMENT TO ARBITRATE ON AN INDIVIDUAL BASIS CANNOT BE DEEMED UNENFORCEABLE MERELY BECAUSE THE UNDERLYING CONTRACT PROHIBITS CLASS ACTIONS.

Muhammad asks this Court to declare the prohibition against class actions in her loan agreements unconscionable and thereby nullify her agreement to arbitrate individually. Her arguments are premised on a fundamental misconception that, because the doctrine of unconscionability is generally applicable to all contracts, an arbitration agreement may be voided by the simple expedient of making an *ad hoc* determination that one of its provisions is "unconscionable."In fact, the FAA cannot be circumvented so easily.

In enacting the FAA, Congress "declared a national policy favoring arbitration and withdrew the power of the

states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating,* 465 *U.S. 1,* 10, 104 S. Ct. 852, 858, *79 L.Ed.2d 1, 12* (1984). The Act's "basic purpose" is "to put arbitration provisions on the same footing' as a contract's other terms." *Allied-Bruce Terminix Cos. v. Dobson,* 513 *U.S.* 265, 275, 115 S. Ct. 834, 840, 130 *L.Ed.2d* 753, 765 (1995) (quoting *Scherk v. Alberto-Culver Co.,* 417 *U.S.* 506, 511, 94 S. Ct. 2449, 2453, 41 *L.Ed.2d* 270, 276 (1974)). *See also Martindale v. Sandvik, Inc.,* 173 *N.J. 76,* 83-84 (2002) ("Congress enacted the Federal Arbitration Act * * * to abrogate the then-existing common law rule disfavoring arbitration agreements `and to place arbitration agreements upon the same footing as other contracts.,") (quoting *Gilmer V. Interstate/Johnson Lane Corp.,* 500 *U.S. 20, 24,* 111 S. Ct. 1647, 1651, 114 *L.Ed.2d* 26, 36 (1991)).

Accordingly, Section 2 of the FAA "embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate * * is revocable `upon such grounds as exist at law or in equity for the revocation of any contract.'" *PerryThomas,* 482 *U.S.* 483, 489, 107 S. Ct. 2520, 2525, 96 *L.Ed.2d* 426, 435 (1987) (quoting 9 *U.S.C. § 2).* Unless that savings clause applies, "[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law." Id.* at 492 n.9 (emphasis in original) (citation omitted).

Thus, section 2 of the FAA carves out a limited role for the states in the regulation of contractual arbitration. An agreement to arbitrate may be invalidated on state-law grounds only "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry,* 482 *U.S.* at 492 n.9 (emphasis in original). Accordingly, Section 2 gives the states, for example, "a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision."

Allied-Bruce, 513 *U.S.* at 281. However, "[a] state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2." *Perry,* 482 U.S. at 493 n.9 (citation omitted). "Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what * * * the state legislature cannot." *Id.*

In sum, as the Supreme Court has ruled:

> What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal "footing," directly contrary to the Act's language and Congress' intent.

Allied-Bruce, 513 *U.S.* at 281. *See also Martindale,* 173 *N.J.* at86 (quoting *Allied-Bruce).*

The *ad hoc* creation of unconscionability doctrine in order to defeat arbitration is impermissible under any circumstances. But in this case it is particularly uncalled for because the prohibition on class actions in the contracts between Muhammad and County Bank is not contained within the arbitration provisions. Instead, it is a separate, free-standing provision. Pa 186-88. Accordingly, we agree with County Bank that whether the class-action prohibition is enforceable is not a "gateway" question of arbitrability for a court *(see Howsam v. Dean Witter Reynolds, Inc.,* 537 *U. S. 79,* 84, 123 S. Ct. 588, 592, 154 *L. Ed. 2d* 491, 497 (2002)); rather, it is reserved for the arbitrator. *Prima* Paint *v. Flood & Conklin Manufacturing Co.,* 388 *U.S.* 395, 402-04, 87 S. Ct. 18011 1805-06, 18 *L.E.2d* 1270, 1276-77 (1967). *See generally* County Bank Br. 31-34.

Even if the Court were to reach the issue, however, it would be inappropriate to deny enforcement of Muhammad's arbitration agreement on the ground that her underlying contract contains a class-action waiver. Under the existing law of this state, the inclusion of such a waiver in a contract is not unconscionable. Moreover, any newly-minted principle of New Jersey law that invalidates waivers of class arbitration would be preempted by the FAA.

A. Under Either New Jersey or Delaware: Law, Class-Action Waivers Are Not Unconscionable.

Muhammad challenges the class-action waivers in her contracts as unconscionable under New Jersey law. See Muhammad Br. 16-24. Her arguments in this case are a particularly clear example of the burgeoning strategy of seeking the invalidation of arbitration agreements based on state-law rules that are described under the rubric of general contract law, but in fact have been fashioned solely to deal with arbitration agreements. However, there is no place for her arguments either in the law of this state or under Delaware law.

1. Under New Jersey law, class-arbitration waivers are enforceable.

Courts are (and should be) sparing in their reliance on the doctrine of unconscionability to invalidate contractual agreements. In accordance with this principle, the standards under New Jersey law for a finding of unconscionability are stringent.[1] As one appellate court has explained, to

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[1] As the Appellate Division noted, courts in New Jersey (as in many other states) examine unconscionability by looking "at two factors, namely, unfairness in the formation of the contract (procedural unconscionability) and excessively disproportionate terms (substantive unconscionability)." *Muhammad*, 379 *N.J. Super.* at 236 (citing *Sitogum*

"demonstrate unconscionability," a plaintiff must "show[] some overreaching or imposition resulting from a bargaining disparity between the parties, or such patent unfairness in the contract that ***no reasonable person*** not acting under compulsion or out of necessity would accept its terms." *Howard v. Diolosa,* 241 *N.J. Super.* 222, 230 (App. Div. 1990) (emphasis added). See also *Sitogum,* 352 *N.J. Super.* at 565 (contract is substantively unconscionable only if it is "so one-sided as to **shock the *court's conscience")*** (emphasis added).

Given the strict nature of New Jersey's unconscionability standard, it is no surprise, then, that the leading New Jersey appellate decision on the issue has concluded that class-action waivers in arbitration provisions are fully enforceable. See *Gras v.* Assocs. *First* Capital *Corp., 346 N.J. Super.* 42, 54 (App. Div. 2001). In *Gras,* the plaintiffs argued (as Muhammad does here) that an "arbitration agreement's preclusion of their right to proceed as a class * * * violates New Jersey's policy of protecting consumers." *Id.* at 49. Canvassing case law from around the country, the Appellate Division noted some of the many cases that have found class-action waivers to be enforceable. Id. at 49-51. As to those cases "where courts have found arbitration agreements precluding a class action to be unenforceable because of their detrimental impact on consumers' rights" *(id.* at 51), the court's conclusion was straightforward: "These cases are not persuasive." *Id.* Finally, the court held that nothing about the Consumer Fraud Act ("CFA") precluded parties to an arbitration agreement from agreeing to arbitrate CFA claims on an individual basis. Id. at 53-54. *See also Cunningham v. Citigroup, Inc.,* 2005 *WL* 3454312, at *6 (D. N.J. Dec. 16, 2005) ("anti-class action provisions have not been found to

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Holdings, Inc. v. Ropes, 352 *N.J. Super.* 555, 564 (Ch. Div. 2002)). We focus here on the issue of substantive unconscionability.

be per se contrary to public policy under New Jersey state law") (citing *Gras* and decision below).

Gras, Cunningham and the decision below are consistent with the decisions of the overwhelming majority of courts around the country that have addressed the question and declared that a class-action waiver, standing by itself, is not substantively unconscionable.

To begin with, the U.S. Supreme Court broached the issue in *Gilmer v.* Interstate/Johnson *Lane Corp., supra.* The plaintiff. there contended that disputes under the Age Discrimination in Employment Act ("ADEA") should not be subject to arbitration because, among other things, arbitration procedures "do not provide for * * * class actions." 500 *U.S.* at 32. The SupremeCourt rejected that argument, explaining that, "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." *Id.* (quotation marks and citation omitted; alteration in original).

Numerous other courts have upheld arbitration provisions that included a prohibition on class actions. As the U.S. Court of Appeals for the Seventh Circuit has explained, "[w]hen contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial.* * * One of those * * * is the possibility of pursuing a class action." *Champ v. Siegel Trading Co.,* 55 *F.3d* 269, 276 (7th Cir. 1995) (quotation marks and citation omitted). This is perfectly acceptable because the right to a class action is "merely a procedural one, * * * that may be waived." *Johnson v. W. Suburban* Bank, 225 *F.3d* 366, 369 (3d Cir. 2000).

The list of other cases upholding class-action waivers against state-law unconscionability challenges is long and growing by the day. See, e.g., Caley v. *Gulfstream Aerospace Corp., 428 F.3d* 1359, 1378 (11th Cir. 2005) (Georgia law); *Jenkins v. First* Am. Cash Advance *of Ga., LLC,* 400 *F.3d* 868, 877-78 (11th Cir. 2005) (Georgia law); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC,* 379 *F.3d* 159, 174-75 (5th Cir. 2004) (Louisiana law); *Snowden v. CheckPoint* Check *Cashing,* 290 *F.3d* 631, 638 (4th Cir. 2002) (Maryland law); *Lloyd v.* MBNA Am. Bank, N.A. *27 Fed. Appx. 82, 84* (3d Cir. 2002) (Delaware law); *Provencher v. Dell, Inc.,* _ *F. Supp. 2d* 2006 *WL* 9626, at*5-*7 (C.D. Cal. Jan. 3, 2006) (Texas law); *Dambrosio v. ComcastCorp.,* 2005 *WL* 3543794, at *17 (E.D. Pa. Dec. 27, 2005) (Pennsylvania and Illinois law); *Copeland v. Katz,* 2005 *WL* 3163296, at *4 (E.D. Mich. Nov. 28, 2005) (Michigan law); *Edwards v. Blockbuster, Inc.,* 400 F. *Supp. 2d* 1305, 1309 (E.D. Okla. 2005) (Oklahoma law); *Lux v. Good Guys,* 2005 *WL* 1713421 (C.D. Cal. July 11, 2005) (Nevada law); *In re Currency Conversion* Antitrust *Litig.,* 361 F. *Supp.* 2d 237, 259 & n.ll(S.D.N.Y. 2005) (Arizona, Delaware, Nevada, New Hampshire, and South Dakota law); *Jones v. Genus Credit Mgmt. Corp.,* 353 *F. Supp.* 2d 598, 603 (D. Md. 2005) (Maryland law); *Billups v. Bankfirst,* 294 F. *Supp.* 2d 1265, 1273-77 (M.D. Ala. 2003) (Alabama law); *O'Quin v. Verizon Wireless,* 256 F. *Supp.* 2d 512, 517 (M.D. La. 2003) (Louisiana law); *Lomax v.* Woodmen *of the World Life Ins. Soc'y,* 228 F. *Supp.* 2d 1360, 1365 (N.D. Ga. 2002) (Georgia law); *Vigil v. Sears Nat'l* Bank, 205 *F. Supp. 2d* 566, 572 (E.D. La. 2002) (Arizona law); *Pick v. Discover Fin. Servs., Inc.,* 2001 *U.S.* Dist. *LEXIS* 15777, at *16 (D. Del. Sept. 28, 2001) (Delaware law); Zawikowski v. *Beneficial Nat'l* Bank, 1999 *U.S. Dist. LEXIS* 514, at *5 (N.D. Ill. Jan. 11, 1999) (Illinois law); *Rains v. Found. Health Sys. Life* & Health, 23 *P.3d* 1249, 1253 (Colo. Ct. App. 2001) (Colorado law); *Brown v. KFC Nat'l Mgmt Co.,* 921 P.2d 146, 166-67 & n.23 (Haw. 1996) (Hawaii law);

Ragan v. *AT&T Corp.*, 824 *N.E.2d* 1183, 1193-94 (Ill. App. Ct. 2005) (New York law); Rosen v. *SCIL, LLC*, 799 *N.E.2d* 488, 494-95 (Ill. App. Ct. 2003) (Illinois law);*Hutcherson v. Sears* Roebuck & Co., 793 *N.E.2d* 886, 894-96 (Ill. App. Ct. 2003) (Arizona law); *Hubbert v. Dell Corp.*, 835 *N.E.2d* 113, 125-26 (Ill. App. Ct. 2005) (Texas law); *Wilson v. Mike Steven Motors, Inc.*, 2005 *WL* 1277948, at *7 (Kan. Ct. App. May 27, 2005) (Kansas law); *Stenzel v.* Dell, *Inc.*, 870 *A.2d* 133, 144 (Me. 2005) (Texas law); *Walther v. Sovereign* Bank, 872 A.2d 735, 749-51 (Md. 2005) (Maryland law); Tsadilas *v Providian Nat'l Bank*, 786 *N.Y.S.2d* 478, 480 (N.Y. App. Div. 2004) (New York law) ; *Strand v. U. S. Bank Nat'l Ass'n ND*, 693 *N. W.2d* 918, 926-27 (N.D. 2005) (North Dakota law); AutoNation *USA Corp. v. Leroy*, 105 *S.W.3d* 190, 200 (Tex. Ct. App. 2003) (Texas law); Stein v. *Geonerco, Inc.*, 17 P.3d 1266, 1270-71 (Wash. Ct. App. 2001) (Washington law).[2]

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[2] *But see, e.g., Discover* Bank v. *Superior Court*, 113 *P.3d* 1100 (Cal. 2005) (determining that in "some circumstances" class action waivers in arbitration provisions are unconscionable); State *ex rel. Dunlap v. Berger*, 567 *S.E.2d* 265, 279-81 (W. Va. 2002); *Leonard v. Terminix Intl Co.*, 854 So. *2d* 529 (Ala. 2002). The U.S. District Court for the Northern District of West Virginia recently refused to follow *Berger* on the ground that its analysis is preempted by the FAA. See Schultz v. *AT&T Wireless Serrs., Inc.*, 376 F. *Supp.* 2d 685, 691 (N.D. W. Va. 2005). Meanwhile, numerous federal district courts in Alabama have distinguished *Leonard* and enforced class-action waivers under Alabama law on the ground that the arbitration fees in Leonard were far greater than any potential recovery and that the arbitration provision in *Leonard* limited the types of damages that could be awarded and in particular precluded the award of attorneys' fees. *See, e.g., Pitchford v.* AmSouth Bank, 285 F. *Supp.* 2d 1286, 1296 (M.D. Ala. 2003) ("The costs of arbitrating the Leonards' claim (at least [$1,1001) exceeded the dollar value of their claim (less than [$5001), which effectively made arbitration an illusory forum for vindicating their substantive rights."); *Taylor v. First N.* Am. *Nat'l* Bank, 325 *F. Supp. 2d* 1304, 1319-22 (M.D. Ala. 2004)); Battels v. *Sears Nat'l* Bank, 365 *F. Supp. 2d* 1205, 1217 (M.D. Ala. 2005); *Lawrence v. Household* Bank (SB), N.A., 343 F. *Supp.* 2d 1101, 1112 (M.D. Ala. 2004); *Billups v. Bankfirst*, 294 F. *Supp. 2d* 1265, 1276-77 (M.D. Ala. 2003); *Gipson v. Cross Country Bank*, 294 F. *Supp. 2d* 1251, 1263-64

That so many courts have held that there is nothing unconscionable about class-arbitration waivers makes perfect sense because class actions, although at times useful, are in no way so fundamental to the vindication of consumer claims as to be unwaivable. For the vast majority of the history of this state and this nation, class actions for money damages did not even exist. Class actions for damages of the type so prevalent today took shape no more than 40 years ago.[3] Such a recent innovation can hardly be deemed so fundamental as to make a contractual waiver of it categorically unconscionable under New Jersey law. Indeed, the *Gras* court recognized as much, explaining that the CFA contains no "legislative mandate or overriding public policy in favor of class actions," whereas compelling public policy favors the enforcement of arbitration provisions. 346 *N.J. Super.* at 54.

In the face of such authority, Muhammad nonetheless argues that the prohibition against class arbitration should be deemed invalid under New Jersey law because, in her view, it is "exculpatory." See Muhammad Br. 1-2, 16-24. The central authority on which she relies is the Appellate Division's decision in *Lucier v. Williams,* 366 *N.J. Super.* 485 (App. Div. 2004). *See also* Legal Servs. Amicus Br. 2

(M.D. Ala. 2003); *Taylor v. Citibank USA, N.A., 292 F. Supp. 2d* 1333, 1345-46 (M.D. Ala. 2003).

[3] "[M]odern class action practice emerged in the 1966 revision of [Federal Rule of Civil Procedure] 23" *(Ortiz v. Fibreboard Corp., 527 U.S.* 815, 833, 119 S. Ct. 2295, 2308, 144 *L.Ed.2d* 715, 731-32 (1999)), which gave federal-court class actions their "current shape" (Amchem *Prods., Inc. v. Windsor,* 521 *U.S.* 591, 613, 117 S. Ct. 2231, 2245, 138 *L.Ed.2d* 689, 706 (1997)). Revised Rule 23's "most adventuresome innovation" was its authorization of "class actions for damages designed to secure judgments binding all class members save those who.affirmatively elected to be excluded." *Id.* at 614-15. The rule governing modern class actions in New Jersey state courts is of even more recent vintage; Rule 4:32-1 "is modeled after" Federal Rule 23 *(In re Cadillac V-8-6-4 Class* Action, 93 *N.J.* 412, 42425 (1983)).

(citing *Lucier).* But contrary to her implication, *Lucier* does not hold that a consumer's contractual waiver of the class-action device immunizes the business with which she has contracted from liability. *See* Muhammad Br. 16. In *Lucier,* a contract between a home inspection service and home buyers placed a ceiling on the amount of damages recoverable by the buyers, limiting the damages to the lesser of $500 or half the home inspection fee. 366 *N.J. Super.* at 493. Because of that substantive limitation, the Appellate Division held, "the potential damage level is so nominal that it has the practical effect of avoiding almost all responsibility for the professional's negligence." *Id.* By contrast, a prohibition of class actions does not in itself exculpate anyone; a plaintiff would be able to obtain the full measure of damages through individual arbitration.

Nor does the recognition of courts that class actions can be useful in certain cases translate into a general principle of New Jersey law that waivers of the right to proceed on behalf of a class are unenforceable. Muhammad cites a number of cases that point out that class certification may be warranted where individual ***litigation*** of claims is not feasible (Muhammad Br. 17-10; see also Legal Servs. *Amicus* Br. 13-22), but her reliance on those cases misses the mark.[4] None of these cases involved arbitration; instead, courts faced the binary choice between class litigation and individual litigation. A third route individual arbitration - was not presented, and the strong federal policy favoring

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[4] For example, Muhammad cites *Carnegie V. Household International, Inc.,* 376 F.3d 656 (7th Cir. 2004). There, the Seventh Circuit affirmed an order granting class certification explaining that "a class action has to be unwieldy indeed before it can be pronounced an inferior alternative * * * to ***no litigation at all.***" Id. at 661 (emphasis added). Muhammad also cites *Weiss v. Regal Collections,* 385 F.3d 337 (3d Cir. 2004). In that transparently irrelevant case, the Third Circuit held that an offer of judgment under Federal Rule of Civil Procedure 68 to a named plaintiff in a putative class action did not moot the plaintiff's class action complaint under the Fair Debt Collection Practices Act. *Id.* at 348.

arbitration was therefore not at issue. Because of the "simplicity, informality, and expedition of arbitration" *(Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 *U.S.* 614, 628, 105 S. Ct. 3346, 3354, 87 *L.Ed.2d* 444, 456 (1985)), individual ***arbitration*** is far more realistic and accessible than individual ***litigation.*** Indeed, the U.S. Supreme Court has strongly suggested that arbitration is a superior method for consumers to resolve small claims. As the Court explained in *Allied-Bruce,* without the availability of arbitration, "the typical consumer who has only a small damages claim (who seeks, say, the value of only a defective refrigerator or television set)" would be left "without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery." 513 *U.S.* at 281. In contrast - as a substantial majority of courts that have considered the issue have concluded - consumers can effectively vindicate small claims through individual arbitration.[5] Accordingly, this Court should reject Muhammad's invitation to devise a novel principle of New Jersey unconscionability law declaring waivers of class arbitration to be unenforceable.

2. Class-arbitration waivers are also enforceable under Delaware law.

We agree with County Bank's contention that Delaware law in fact applies to this case, so we will not repeat the argument. Under the law of that state, too, it is clear that class-arbitration waivers are fully enforceable.

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[5] In addition to decisions of this Court, plaintiffs rely on decisions of the U.S. Supreme Court and Third and Seventh Circuits for their encomium to class actions. See Muhammad Br. 18-19. But the Supreme Court has suggested in *Gilmer* that there is nothing problematic about class-action waivers, and the Third and Seventh Circuits have ruled that class-action waivers in arbitration provisions are enforceable. *See Johnson v. W. Suburban Bank,* 225 *F.3d* 366; *Champ v. Siegel Trading Co.*, 55 *F.3d* 269.

Courts within and outside Delaware have repeatedly concluded that Delaware law does not render the waiver of class arbitration unconscionable. *See, e.g., Edelist v. MBNA* America Bank, '790 A.2d 1249, 1260-61 (Del. Super. Ct. 2001); *Lloyd v. MBNA Am. Bank, N.A.* 27 Fed. *Appx.* 82, 84 (3d Cir. 2002); *Pick v. Discover Fin. Servs., Inc.*, 2001 *U.S. Dist. LEXIS* 15777, at *16 (D. Del. Sept. 28, 2001); *In re Currency Conversion* Antitrust *Litig.*, 361 *F. Supp.* 2d 237, 259 & n.ll (S.D.N.Y. 2005).

In *Edelist,* for example, the Delaware Superior Court upheld a provision of a credit card agreement "preventing arbitration of disputes on a class-wide basis"; noting that the "surrender of that class action right was clearly articulated in the arbitration amendment," the Court saw "nothing unconscionable about it. 790 A.2d at 1260-61. And just last month, two California courts cited *Edelist* in reaching the conclusion that "Delaware would not invalidate an arbitration clause merely because it prohibited class actions."[6]

Thus, if the Court chooses to apply Delaware law (as it should), the class-action waiver in Muhammad's agreements must be upheld - just as it should be under New Jersey law.

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[6] *Klussman v. Cross Country* Bank, 36 Cal. *Rptr.* 3d 728, 735 (Cal. Ct. App. 2005) (citing *Edelist,* but choosing to apply California law instead to invalidate an arbitration provision); *see also Discover Bank v. Superior Court,* 36 Cal. Rptr. 3d 456, 459-60 (Cal. Ct. App. 2005) (on remand from California Supreme Court's decision in *Discover Bank,* 113 *P.3d* 1100, applying Delaware law and holding that "the class action waiver in (plaintiff's) cardholder agreement is enforceable, and not unconscionable, under Delaware law").

B. The FAA Would Preempt A Rule That Class-Arbitration Waivers In Arbitration Agreements Are Unconscionable.

As we explained above (at 10-21), class-action waivers arenot unconscionable under either New Jersey or Delaware law. In any event, the FAA would preempt any state-law holding that it is unconscionable to include in a contract a provision requiringindividual arbitration.

1. Section 2 of the FAA would expressly preempt any holding that prohibitions against class arbitration are unconscionable.

Under Section 2 of the FAA,

> [a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law,* "save upon such grounds as exist at law or in equity for the revocation of any contract." * * * A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2.

Perry, 482 *U.S.* at 492-93 n.9 (citation omitted; emphasis in original) (quoting 9 U.S.C. § 2). Thus, agreements to arbitrate may be invalidated on state-law grounds only "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Id.* (emphasis in original).

That principle does not simply prohibit the invalidation of "arbitration agreements under state laws applicable *only* to arbitration provisions." *Doctor's Assocs., Inc. v.* Casarotto, 517 *U.S.* 681, 687, 116 S. Ct. 1652, 1656,

134 *L.Ed.2d* 902, 909 (1986) (emphasis in original). It also bars courts from impeding the enforceability of arbitration agreements by fashioning rules that invoke broad concepts of contract law but in fact apply only or predominantly to the arbitration setting. As the Fifth Circuit recently explained:

> That a state decision employs a general principle of contract law, such as unconscionability, is not always sufficient to ensure that the state-law rule is valid under the FAA. * * * [S] tate courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny.

Iberia, 379 *F.3d* at 167.

Nor, despite Muhammad's exhortation to do so, could the Court manufacture new principles in the context of thwarting an arbitration agreement. To put it bluntly, "no state can apply to arbitration (when governed by the Federal Arbitration Act) any novel rule." *Oblix, Inc. v. Winiecki,* 374 *F.3d* 488, 492 (7th Cir. 2004). *See* also *Zuver v.* Airtouch *Communications, Inc.,* 103 *P.3d* 753, 759 (Wash. 2004) ("courts may not refuse to enforce arbitration agreements under state laws which apply only to such agreements, or by relying on the *uniqueness* of an agreement to arbitrate") (quotation marks, alterations, and citations omitted; emphasis in original).

To accept Muhammad's invitation to declare County Bank's arbitration provision unconscionable because the underlying contract prohibits class arbitration would run afoul of these rules and thus would be expressly preempted by Section 2 of the FAA.

First, New Jersey has no ***generally applicable*** prohibition against contractual waivers of class actions. Neither Muhammad nor the *amici* supporting her have

pointed to any authority for the proposition that class-action waivers are generally unenforceable under New Jersey law outside the context of arbitration.[7] Absent such case law or statutory authority, the FAA does not permit the creation of such a rule specifically in the context of arbitration. In essence, what Muhammad is asking the Court to do is to declare a ***new*** principle of unconscionability and then to apply it in the very same case to strike down an arbitration provision. That request for the ad *hoc* creation of unconscionability doctrine is inconsistent with the Supreme Court's admonition that state-law contract defenses may be used to void arbitration provisions only if they "arose to govern issues concerning the validity, revocability, and enforceability of contracts ***generally"*** *(Perry,* 482 *U.S.* at 493 n.9 (emphasis added)). Indeed, Congress's rationale for authorizing contract-law exceptions to the general rule that arbitration provisions are enforceable - that there can be no impermissible animosity toward arbitration when a court is merely applying an ***extant,*** generally applicable contract-law defense - loses all force when, as here, the party seeking to avoid arbitration is trying to reinvent and enlarge unconscionability doctrine as it goes along. *See Oblix,* 374 *F.3d* at 492 ("[N]o state can apply to arbitration (when governed by the Federal Arbitration Act) any novel rule.").

Second, as noted above (at 11), the ***generally applicable*** standard for finding unconscionability in New Jersey is a strict one. Under that standard, a plaintiff must "show[] some overreaching or imposition resulting from a bargaining disparity between the parties, or such patent unfairness in the contract that no reasonable person not acting under compulsion or out of necessity would accept its

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[7] In fact, as we noted above, the leading New Jersey appellate decision on the issue has concluded that class-action waivers in arbitration provisions are fully enforceable. *See Gras, supra,* 346 *N.J. Super.* at 54; *see also Cunningham, supra,* 2005 *WL* 3454312, at *6 (citing *Gras* and decision below).

terms." *Howard*, 241 *N.J. Super.* at 230. Put another way, a contract is unconscionable only if it is "so one-sided as to shock the court's conscience." *Sitogum*, 352 *N.J. Super.* at 565.

We submit that it is impossible to conclude that it shocks the conscience, or that one must be acting "under compulsion," to accept a fully disclosed class-action waiver.[8] To the contrary, there are many reasons why a reasonable person would accept a contract that allows for the easy resolution of her own actual, concrete disputes via individual arbitration, but deprives her of the ability to bring class actions for other customers' benefit. Foremost among them is that individual arbitration is the least expensive means of dispute resolution and hence serves to moderate the cost of goods and services (such as the interest rate and fees associated with the loans at issue here).[9] *See Carnival Cruise Lines, Inc. v. Shute*, 499 *U.S.* 585, 594, 111 S. Ct. 1522, 1527, 113 *L.Ed.2d* 622, 632 (1991) (explaining that limiting fora in which cruise line may be sued leads to reduced fares for passengers); *see also* Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 94 (arguing that class arbitration makes consumers worse

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[8] As the Appellate Division found here, the fact that Muhammad "needed money to purchase school books" did not make her the "victim of sufficient economic duress" to render the arbitration provision unconscionable, though she "may have been experiencing financial stress." *Muhammad*, 379 *N.J. Super* at 241.

[9] We do not dispute that the cost of short-term loans can be high when expressed in annualized percentage terms (as opposed to absolute dollar amounts). Yet they would be higher still in the absence of a prohibition against class actions. Without a class waiver, the high-stakes nature of class arbitration would result in substantially higher litigation costs to lenders; those costs, in turn, would be passed along to borrowers in the form of higher rates or loan fees. At some point, the cost would exceed the means of some borrowers, potentially forcing them to turn to less savory sources of short-term funds.

off by increasing the cost of doing business and, as a result, raises prices for consumers). As the Seventh Circuit has recognized,"[a]rbitration offers cost-saving benefits and `thesebenefits are reflected in a lower cost of doing business that in competition are passed along to customers.'" *Boomer v. AT&T Corp.*, 309 F.3d 404, 419 n.7 (7th Cir. 2002) (quoting *Metro East Ctr. for conditioning & Health v. Qwest Communications Int'l, Inc.*, 294 *F.3d* 924, 927 (7th Cir. 2002) (Easterbrook, J.)).

Individuals may also understand that arbitration will provide them with better results. Studies have shown that "consumers are likely to fare better in arbitration, both in terms of the likelihood of success on the merits and the size of the award, than in litigation" and that "parties who participate in arbitration proceedings are generally satisfied, both in terms of the fairness of the process and the equity of the outcome." Joshua Lipshutz, Note, *The Court's Implicit* Roadmap: Charting the Prudent *Course* At *the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits,* 57 STAN. L. REV. 1677, 1712 (2005) (footnotes omitted). Consumer perceptions match the reality. A recent poll found that "[a]rbitration is widely seen" by participants "as faster (74%), simpler (63%), and cheaper (51%) than going to court." Harris Interactive, Arbitration: *Simpler,* Cheaper, *and Faster* Than *Litigation* (Apr. 2005), at 5, available at http://www.instituteforlegalreform.org/resources/ArbitrationStudyFinal.pdf.

Moreover, many Americans have become skeptical of classactions. A March 2003 survey found that 1167% of Americans believe that lawyers benefit most from the current class action suit system while 61% think that ***consumers*** (32%) and ***class members*** (29%) benefit ***least*** from the current system." Penn, Schoen & Berland Associates, U.S. Chamber of Commerce, Institute for Legal Reform, Polling on The Class Action System: National Results, available at

http://www.instituteforlegalreform.com/resources/classaction .pdf (emphasis added). These results support the view that "[m]any ordinary Americans seem to think that class actions are a new-fangled litigation device invented by greedy plaintiff attorneys." Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation,* 11 DUKE J. COMP. & INTEL L. 179, 180 (2001) . As Congress has recently recognized,' "abuses of the class action device" have "undermined public respect" for the judicial system, and created a system in which "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed," while lawyers generate large fees. Class Action Fairness Act of 2005, Pub. L. 109-2, § 2 (codified at 28 *U.S.C.* § 1711 note).

Accordingly, a consumer would not be irrational in the least to trade the ability to be part of a class action for the availability of arbitral dispute resolution, particularly because individual arbitration generally leads to reduced dispute-resolution costs for consumers.[10] To assume otherwise would contravene New Jersey's ***generally applicable*** approach to unconscionability, which Section 2 of the FAA forbids. "Even when using doctrines of general applicability, the state courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny." *Iberia,* 379 *F.3d* at 167.

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[10] Of course, the consumer could also rationally choose to trade the ability to be part of a class action in consideration for other benefits furnished as part of the underlying contract, such as ready access to short-term, unsecured credit.

2. Conditioning the enforceability of arbitration provisions on the availability of class-wide arbitration would conflict with Congress's objectives in enacting the FAA and would therefore be preempted.

Any holding that an arbitration provision must allow for class-wide arbitration in order to be enforceable is also preempted under traditional principles of conflict preemption because it "stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress" in enacting the FAA. *United States v. Locke,* 529 *U.S.* 89, 109, 120 *S. Ct.* 1135, 1148, 146 *L.Ed.2d* 69, 89 (2000) (internal quotation marks and citation omitted).

Section 2 of the FAA declares pre-dispute arbitration agreements "valid, irrevocable, and enforceable" because "arbitration saves time, saves trouble, saves money." *Joint Hearings* on S. *1005 and H.R. 646 Before* the Subcomms. *of the Comms. on the Judiciary,* 68th Cong., 1st Sess., at 7 (1924) (statement of Charles Bernheimer, N.Y. Chamber of Commerce). As Congress later explained, arbitration usually is "cheaper and faster than litigation," has "simpler procedural and evidentiary rules," "minimizes hostility," and is "more flexible in regard to scheduling." H.R. REP. No. 97-542, at 13 (1982). The U. S. Supreme Court, too, has recognized the superior "simplicity, informality, and expedition of arbitration." *Mitsubishi,* 473 *U.S.* at 628. *See also Barcon Assocs., Inc. v. Tri-County Asphalt Corp.,* 86 *N.J.* 179, 187 (1981) (arbitration's "object is the final disposition, in a speedy, inexpensive, expeditious and perhaps less formal manner, of the controversial differences between the parties") (citation and quotation marks omitted).

Class-action procedures, by contrast, are antithetical to the low-cost and efficient resolution of disputes that is the

hallmark of arbitration. While the average length of an AAA arbitration from filing to award is less than six months *(see Allied-Bruce,* 513 *U.S.* at 280-81), class actions can take years. These complex matters invariably begin with a lengthy collateral proceeding to determine the propriety of class certification, which generally entails (i) substantial discovery, including depositions of all class representatives (and often other witnesses) for purposes of determining such statutory prerequisites as typicality and adequacy of the class representatives and commonality of the claims across class members; (ii) plenary briefing of the class certification issue; (iii) an evidentiary hearing; (iv) a written ruling; and very often (v) a motion for leave to appeal initiated by the losing party; and, if leave is granted, (vi) the subsequent, fully-briefed interlocutory appeal.

If, after all of that, a class is certified, there would have to be full and adequate notice to class members and an opportunity to opt out. Discovery commensurate with the now-increased stakes of the litigation would then begin and likely continue for years. Should the defendant then yield to the hydraulic pressure to settle that class certification creates, there would need to be another round of notice followed by a fairness hearing, complete with extensive briefing by both sides and by any objectors. And. if the defendant chooses not to settle, there would need to be a class-wide trial - one in which the plaintiffs are required to establish any individualized elements of their claims and the defendant is afforded the opportunity to put on any individualized defenses.

Whether conducted by a court or by an arbitrator, all of the procedures necessary to the fair administration of a class action make arbitration more expensive and more time consuming – and, in the process, eradicate the distinction

between arbitration and litigation.[11] In fact, some commentators believe that "class arbitration may actually prove **more** burdensome than class litigation." Jack Wilson, *"No-Class-Action Arbitration Clauses," State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUINNIPIAC L. REV. 737, 774 (2004) (emphasis added) ; *see also* Lindsay R. Androski, *Comment, A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses*, 2003 U. CHI. LEGAL F. 631, 649 (hybrid class arbitration "subjects arbitration to the very judicial burden that the contracting parties sought to avoid through arbitration").

Not only would grafting time-consuming and expensive class-action procedures onto an arbitral proceeding essentially eliminate the distinction between arbitration and litigation, but it also presents businesses with a "worst-of-all-worlds" scenario. While the stakes would be increased exponentially over an individual arbitration, any

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[11] See Jonathan R. Bunch, Note, *To Be Announced: Silence from the United States Supreme Court and Disagreement Among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration: Green Tree Fin. Corp. v. Bazzle*, 2004 J. DISP. RESOL. 259, 272 ("[W]hen class-wide arbitration is chosen as the means to resolve many similar claims, the many benefits of the arbitration process are lost in favor of a procedural device which brings the burdens of litigation into the arbitral forum. It is somewhat ironic that the greatest advantages of arbitration are in many instances the greatest disadvantages of litigation, yet class-wide arbitration * * * lessens the distinction between the two processes."); Jean R. Sternlight, As Mandatory *Binding Arbitration Meets the Class Action, Will* the *Class* Action *Survive?*, 42 Wm. & MARY L. REV. 1, 44-45 (2000) ("[S]everal attorneys who have actually participated in classwide arbitrations have found that the procedure, at least as used to date, differs very little from litigation and thus offers few, if any, advantages."); Elizabeth P. Allor, *Note, Keating v. Superior Court: Oppressive Arbitration Clauses in Adhesion Contracts*, 71 CAL. L. REV. 1239, 1253 (1983) ("[W]hen conducted -on a classwide basis, arbitration is unlikely to remain inexpensive and efficient.").

class-wide arbitral award would remain reviewable only for fraud, bias, or "manifest disregard" of the law. See 9 *U.S.C.* § 10; *Wilko v. Swan,* 346 *U.S. 427,* 436-37, 74 S. Ct. 182, 187, 98 *L.Ed.* 168, 176 (1953), *overruled on other grounds by Rodriguez de Quijas V.* Shearson/American *Express, Inc.,* 490 *U.S. 477,* 109 S. Ct. 1917, 104 *L.Ed.2d* 526 (1987). In such circumstances, few businesses would be willing to roll the dice by including an arbitration provision in their consumer contracts; "[c]lass arbitration just seems to present too many risks." Wilson, *supra,* 23 QUINNIPIAC L. REv. at 778.

As the distinction between litigation and arbitration erodes, businesses will stop including arbitration provisions in their contracts in the first place, concluding "that the known, class litigation, is preferable to unknown, class arbitration." *Id.* Thus, the consequence of conditioning the enforcement of consumer arbitration provisions on the business subjecting itself to class-wide arbitration would not be fairer or more efficient arbitration - but rather ***more litigation*** and ***less arbitration.*** Nothing could more clearly "frustrate the purpose" (Livadas v. *Bradshaw,* 512 U.S. 107, 116, 114 *S.* Ct. 2068, 2074, 129 *L.Ed.2d* 93, 105 (1994)) of the FAA. As the Fifth Circuit recently explained in rejecting an attack on a class-arbitration waiver "the fact that certain litigation devices may not be available in arbitration is part and parcel of arbitration's ability to offer `simplicity, informality, and expedition,' characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims." *Iberia,* 379 *F.3d* at 174 (quoting *Gilmer,* 500 *U.S.* at 31) ; *see also id.* At (for parties to demand "all of the procedural accoutrements that accompany a judicial proceeding" would undermine "the point of arbitration").

Accordingly, under the doctrine of conflict preemption -and regardless of any state-law concern about "the unavailability of class action relief" - "the Supremacy

Clause of the Federal Constitution * * * preclude[s] [a court] from invalidating an arbitration agreement otherwise enforceable under the FAA simply because a plaintiff cannot maintain a class action." *Pyburn v. Bill Heard* Chevrolet, 63 *S.W.3d* 351, 364 (Tenn. Ct. App. 2001), *appeal* denied (Tenn. Nov. 19, 2001). See *also Schultz v. AT&T Wireless Servs., Inc.*, 376 F. *Supp. 2d* 685, 691(West Virginia Supreme Court's holding that class-arbitration waiver was unconscionable is preempted by the FAA and therefore "the plaintiff's argument that the arbitration clause is unconscionable due to its foreclosure of class action relief * * * lacks merit"); *Am. Gen. Life & Accident Ins. Co. v. Wood,* 429 F.3d 83, 90 (4th Cir. 2005) ("West Virginia precedent generally barring state claims from arbitration must be necessarily circumscribed in light of [the FAA]"); *Caley,* 428 *F.3d* 1359, 1378 (arbitration provision's prohibition of class actions is "consistent with the goal of 'simplicity, informality, and expedition' touted by the Supreme Court in Gilmer") (quoting *Gilmer,* 500 *U. S.* at 31).

The strong pro-arbitration purposes of the FAA thus preempt the invention of any state-law principle that would broadly invalidate class-action waivers as applied to arbitration provisions.

II. AN OFFER TO PAY THE COSTS OF ARBITRATION AND TO PROCEED IN AN ALTERNATIVE ARBITRAL FORUM MOOTS ANY ARGUMENT THAT THE COSTS OF ARBITRATION ARE EXCESSIVE OR THAT THE ORIGINAL FORUM IS PROBLEMATIC.

Muhammad argues that she should not be required to arbitrate because she considers the costs of arbitration to be prohibitively expensive. See Muhammad Br. at 22-26. But County Bank long ago offered to pay all of the costs of

arbitration. Muhammad rebuffed that offer, however, so that she could continue to pursue her argument that it is too expensive for her to arbitrate. Allowing her to do so would be entirely unjustified.

To be sure, the U.S. Supreme Court has recognized that, in some circumstances, "the existence of large arbitration costs could preclude a litigant * * * from effectively vindicating her * * * rights in the arbitral forum." *Green Tree Fin. Corp.-Ala. v. Randolph,* 531 *U.S. 79,* 90, 121 S. Ct. 513, 522, 148 *L.Ed.2d* 373, 383 (2000). But the Court made clear that the mere "'risk' that [one] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement" (id. at 91). Nevertheless, plaintiffs routinely invoke such speculation as a stratagem to avoid arbitration. As a result, the Chamber's members often find themselves faced with the argument (whether legitimate or not) that arbitral costs are too high.

In such circumstances, offers to pay the costs of arbitration (such as the one County Bank has made here) are entirely appropriate. As numerous courts around the nation have explained, in order to effectuate the strong federal policy favoring arbitration, offers to pay the costs of arbitration should be credited when considering whether an arbitration provision is enforceable. *See, e.g., Livingston v. Assocs. Fin., Inc.,* 339 F.3d 553, 557 (7th Cir. 2003) ("the fact that [the defendant] agreed to pay *all* costs associated with arbitration forecloses the possibility that the [plaintiffs] could endure any prohibitive costs in the arbitration process") (emphasis in original) ; *Anders v. Hometown Mtg. Servs., Inc.,* 346 F.3d 1024, 1026 (11th Cir. 2003); *Large v. Conseco Fin. Servicing Corp.,* 292 F.3d 49, 56-57 (1st Cir. 2002) ("Conseco's offer to pay the costs of arbitration and to hold the arbitration in the Larges' home state of Rhode Island mooted the issue of arbitration costs.") ; *Dobbins v. Hawk's Enters.,* 198 F.3d 715, 717 (8th Cir. 1999) ; *Anderson v.*

Delta Funding Corp., 316 F. *Supp. 2d* 554, 567 (N.D. Ohio 2004) ; *Jung v. Ass'n of Am. Med. Colts.*, 300 F. *Supp.* 2d 119, 148-49 (D.D.C. 2004) ; *In re Currency Conversion Fee* Antitrust Litig. 265 F. *Supp.* 2d at 41112; *Nelson v. Insignia/ESG, Inc.* 215 *F. Supp. 2d* 143, 157 (D.D.C. 2002); *First Family Fin. Servs., Inc. v. Sanford,* 203 F. *Supp.* 2d 662, 667 (N.D. Miss. 2002) ; *Baugher v. Dekko* Heating *Techs.*, 202 *F. Supp. 2d* 847, 850 (N.D. Ind. 2002) ; *Phillips v. Assocs. Home Equity Servs., Inc.*, 179 F. *Supp. 2d* 840, 847 (N.D. Ill. 2001) ; *Nur v. K.F.C., USA, Inc.*, 142 F. *Supp. 2d* 48, 52 (D.D.C. 2001) ; *Zuver,* 103 P.3d at 763 & n.7 ("refus[ing] to ignore" defendant's "offer[] to `defray the cost of arbitration' by paying arbitration fees," thus rendering "moot" the plaintiff's argument that the fees were unconscionable); *Zobrist v. Verizon Wireless,* 822 *N.E.2d* 531, 539 (Ill. Ct. App. 2004) ("Verizon has already stipulated to a waiver of [the cost-sharing] provision, which, in effect, serves to moot the plaintiff's argument" that arbitration costs are excessive).

Muhammad cites a handful of cases that treat offers to pay the costs of arbitration as unaccepted offers to modify a contract (i.e., the arbitration agreement). See Muhammad Br. 25-26. At bottom, the holding of these cases amounts to a rule that an individual may rely on a contractual term for the sole purpose of seeking to invalidate that contract as unconscionable. That kind of reliance interest lacks legitimacy; in any event, it must fall to the policies favoring arbitration. As the U.S. Supreme Court has explained in a different context, parties resisting enforcement of their arbitration agreements could not avoid arbitration based on the claim "that they agreed to arbitrate future disputes * * * in reliance on [an earlier case] holding that such agreements would be held unenforceable by the courts." *Rodriguez,* 490 *U.S.* at 485. Along similar lines, the Fifth Circuit reversed a lower court's holding that an offer to pay costs constituted an "invalid" unilateral revision to a contract. *Carter v.*

Countrywide Credit Indus., Inc., 362 *F.3d* 294, 300 n.3 (5th Cir. 2004). The court explained that, although that "observation may be accurate as a matter of contract law, what is at issue here is whether these plaintiffs will be required to pay prohibitive arbitration fees and costs if they are forced to proceed to arbitration." *Id.* (emphasis in original). Given an offer to bear all costs, the answer to that question is plainly "no."

The strong federal policy favoring arbitration also supports viewing such offers to pay the costs of arbitration as mooting challenges based on cost. When companies draft standardized arbitration provisions for large numbers of customers, they cannot predict *ex* ante which customers will initiate arbitration with them, what the issues will be in those arbitrations, or what those customers, financial status will be at the time of those disputes. Standardized arbitration provisions nonetheless must allocate arbitration fees between the company and customer in a way that *ex ante* seems reasonable (or, with some frequency, incorporate the default fee schedules of arbitration providers such as the American Arbitration Association or National Arbitration Forum, which Justice Ginsburg has described as providing "models for fair cost and fee allocation." *Randolph*, 531 *U.S.* at 95 (Ginsburg, J., concurring in part and dissenting in part)). Like any ex ante estimate, of course, from time to time the estimated arbitration costs will be more expensive than some customers can reasonably bear (and in other instances will be less expensive than other customers can bear). If the arbitration provision were held unconscionable with respect to every customer who could not afford the costs of arbitration (or claimed he or she could not), that would lead to the widespread invalidation of arbitration provisions. Such a result would run counter to "[t]he preeminent concern of Congress in passing the [FAA]" which "was to enforce private agreements into which parties had entered." *Dean Witter Reynolds, Inc. v. Byrd*, 470 *U.S.* 213, 221, 105 S. Ct.

1238, 1243, 84 *L.Ed.2d* 158, 166 (1985); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 *U.S. 1*, 25-261 103 S. Ct. 927, 941, 74 L.Ed.2d 765, 785 (1983) ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"). Permitting a company to offer to pay arbitration costs alleged to be unaffordable, by contrast, serves the policies favoring arbitration.

Similar considerations also support offers like the one County Bank has made to 'submit to individual arbitration before an alternative forum - the American Arbitration Association. County Bank made that offer after Muhammad indicated in her briefing to the superior court that she believed that her "rights `would be better protected in an arbitration conducted before the AAA as opposed to the [National Arbitration Forum.]'" 379 *N.J. Super.* at 232. For the reasons explained in County Bank's brief, Muhammad's challenges to the NAF, a leading arbitration provider, are meritless.[12] But in any event, as Judge Kestin explained in his concurring opinion below, an offer to make the AAA available as a alternative forum moots the attack on the NAF:

> Because of plaintiff's rejection of defendants' offer to arbitrate the matter under the aegis of the American Arbitration Association * * *, I would not consider any of plaintiff's arguments addressed to the validity of NAF's arbitration procedures. Having forgone the opportunity to avoid the asserted bias and procedural unconscionability inflicted by NAF arbitration

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[12] Many members of the Chamber have entered into arbitration agreements in which the NAF is the selected arbitration provider. As the U.S. District Court for the Central District of California recently remarked in ordering individual arbitration of a consumer claim, "the NAF * * * is without question an inexpensive, efficient, and convenient forum for resolving commercial disputes." *Provencher v. Dell, Inc.*, 2006 WL 9626, at *1.

> standards, plaintiff should not now be heard to attack those very processes, which she, for a second time, elected to be bound by.

379 *N.J. Super.* at 249.

In particular, County Bank's offer moots Muhammad's argument that the discovery available under the NAF rules is inadequate. To be sure, County Bank has shown convincingly that Muhammad has misunderstood the range of discovery available to her under the NAF rules; the Appellate Division correctly concluded that the NAF rules provide for at least as much discovery - if not more - as is available in New Jersey small claims court. *See Muhammad,* 379 *N.J. Super.* at 243; *see also* County Bank Br. 23-25. But even if not, Muhammad's argument is mooted by the bank's offer to arbitrate under the AAA's rules. *See, e.g., Sapiro v. VeriSign,* 310 F. *Supp.* 2d 208, 214 (D.D.C. 2004) ("While defendant maintains that the rules and procedures in the Arbitration Agreement provide for sufficient discovery, [defendant] has agreed to proceed with the arbitration and all discovery under the AAA Rules. * * * Thus, the Court need not determine whether the discovery provisions in the Arbitration Agreement are sufficient."). It would be sheer speculation on Muhammad's part to claim that discovery under the AAA rules is inadequate. As then-Judge Roberts explained for the U.S. Court of Appeals for the D.C. Circuit, the AAA's commercial arbitration rules "leave the decision about which discovery tools to use, and in what manner, to the discretion of the arbitrator." *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 82 (D.C. Cir. 2005). "To invalidate the agreement on the basis of [plaintiff's] speculation would reflect the very sort of suspicion of arbitration the Supreme Court has condemned as far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Id.* (internal quotation marks omitted).

* * * * *

If the federal and New Jersey policies favoring the enforcement of arbitration agreements are taken seriously, offers to waive any allegedly problematic features of an arbitration provision must not be cast aside.

III. MUHAMMAD MAY NOT EVADE HER OBLIGATION TO ARBITRATE BY LEVELING A PUBLIC-POLICY ATTACK ON THE UNDERLYING CONTRACT.

Muhammad's back-door challenge to the arbitration agreementon public policy grounds should also be rejected. Muhammad and her *amici* spend pages of their briefing excoriating "payday lending" practices in an effort to convince this Court that it should invoke policy concerns related to such practices to deny enforcement of County Bank's arbitration provision. See Muhammad Br. 13-16; AARP *Amici* Br. 1, 5, 7-28; Legal Servs. *Amicus Br.* 3-10. Indeed, one group of Muhammad's *amici* focuses its entire brief on attacking the entire short-term loan industry, addressing not only alleged present practices but also purported conduct from as far back as 60 years ago. See AARP *Amici* Br. 13-14.[13] But such arguments are wholly irrelevant to the enforceability of a specific arbitration provision in a specific contract.

Concerns about payday lending can and should be directed to the New Jersey State Legislature, United States Congress, and state and federal agencies - all' of which are well-equipped to address them. However, such attacks cannot be used to escape from an agreement to arbitrate

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[13] In their most dramatic claim, *amici* go so far as to suggest that payday lending injures our soldiers (AARP Amici Br. 8-10). That sort of overreaching attack is designed to distract the Court from the narrow legal issue before it - whether an arbitration provision is enforceable.

disputes arising out of a ***specific*** contract. Under the FAA, challenges to the validity of a contract as a whole that contains an arbitration provision are for the arbitrator, not a court, to decide. An arbitration agreement is separable from, and must be considered independently of, the underlying contract. *Prima* Paint, 388 *U.S.* 395, 402-04. As a matter of the "federal substantive law of arbitrability" *(Moses H. Cone,* 460 *U.S.* at 24), the sole focus must be on the ***arbitration*** agreement. The subject matter of the underlying contract is of no legitimate concern to the Court; such merits issues are solely for an arbitrator to consider.[14] Indeed, Muhammad is free to argue to the arbitrator that her entire loan agreement is invalid on public policy grounds. There is no basis to think that an arbitrator cannot make such a determination, as "we are well past the time when judicial suspicion of the desirability of arbitration and of thecompetence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." Mitsubishi, 473 *U.S.* at 626-27.

Without trivializing New Jersey's legitimate interests in the area of payday lending - which as discussed above can be addressed by the representative branches of state and federal government - it nonetheless remains the case that the FAA does not permit reliance on such "public policy" grounds to eviscerate the enforceability of arbitration

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[14] Hence, for example, every federal court of appeals to have considered the issue has held that a party cannot avoid an arbitration agreement by challenging the underlying contract as illegal. *See Jenkins,* 400 *F.3d* at 880-82; *Bess v. Check Express,* 294 F.3d 1298, 1304-06 (11th Cir. 2002); *Snowden,* 290 F.3d at 636-38; *Burden v. Check Into Cash of Ky., LLC,* 267 *F.3d* 483, 489-90 (6th Cir. 2001); *Harter v. Iowa Grain Co.,* 220 *F.3d* 544, 550 (7th Cir. 2000) ; *3H & Assocs., Inc. v. Hanjin Eng'g & Constr. Co.,* 1998 *WL* 657722, at *2 (9th Cir. Sept. 3, 1998) (unpublished) ; *Lawrence v. Comprehensive Bus. Servs. Co.,* 833 *F.2d* 1159, 1161-62 (5th Cir. 1987). *But see, e.g., Cardegna v. Buckeye Check Cashing, Inc.,* 894 *So.2d* 860 (Fla.), *cert. granted,* 125 S. Ct. 2937 (2005), argued Nov. 29, 2005.

agreements. *Prima Paint* requires courts to determine arbitrability with reference to the arbitration agreements ***alone***: courts "may consider only issues relating to the making and performance of the agreement to arbitrate." 388 U.S. at 404. On that score, it is clear that, just as under federal law, "New Jersey courts also have favored arbitration as a means of resolving disputes." Martindale, supra, 173 *N.J.* at 84; *see also id.* at 85 (collecting cases).

Hence, Muhammad's attempt to shift attention from the arbitrability of her dispute to policy concerns about payday lending cannot withstand scrutiny under *Prima Paint* and its progeny. The Appellate Division was right to reject it. *See Muhammad,* 379 *N.J. Super.* at 234 ("if the practice of offering payday loans in this State is to be abolished, it will take legislative action to do so.").

IV. THE ENFORCEABILITY OF AN ARBITRATION PROVISION SHOULD NOT BE SUBJECT TO QUESTION MERELY BECAUSE IT HAPPENS TO BE CONTAINED WITHIN A FORM CONTRACT.

Muhammad also expends much effort criticizing her arbitration agreement because it is part of a form contract drafted by a company. See Muhammad Br. 13-16; *see* also Legal Servs. *Amicus* Br. 24-29. Indeed, boiled down to their essence, many of Muhammad's arguments are nothing more than a challenge to the use of form contracts themselves. However, as this Court has explained, "the observation that [a given contract] fit[s] the definition of contracts of adhesion is the beginning, not the end, of the inquiry." *Rudbart v. North Jersey Dist. Water Supply Comm'n,* 127 *N.J.* 344, 354 .(1992). Although it is incumbent on courts to ensure that form contracts - like any other contract - are not used in such a one-sided fashion as to deny consumers their rights, those contracts are critical to the modern economy

and the business of the Chamber's members; generic aspersions on them have no place in the law of this or any other state.

The standardization of contractual terms serves the same values as the standardization of goods and services, and is equally "essential to the functioning of the economy." 1 JOSEPH M. PERILLO, CORBIN ON CONTRACTS (rev. ed. 1993) § 1.4, at 15[15]. Form contracts reduce transaction costs by obviating the need to negotiate and draft a separate agreement for each transaction. Market forces enhance the efficiency of standard-form terms; even form contractual terms that might appear to confer an undue advantage to the drafter benefit consumers ex ante by resulting in lower prices due to the drafter's lower marginal costs. *See Carbajal v. H&R Block Tax Servs., Inc.,* 372 F.3d 903, 906 (7th Cir. 2004) ("[f]orms reduce transactions costs and benefit consumers because, in competition, reductions in the cost of doing business show up as lower prices") ; *see generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 127-29 (5th ed. 1998) ; Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines,* 60 U. CHI. L. REV. 1, 39-40 (1993) ; Ronald H. Coase, *The Choice of the institutional Framework: A Comment,* 17 J.L. & ECON. 493, 494 (1974).

Indeed, without form contracts, significant portions of the modern economy would come to a complete standstill. Were banks required to negotiate individually with consumers each time a consumer applied for a credit card or

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[15] *See also* John J.A. Burke, *Contracts as a Commodity: A Nonfiction Approach,* 24 SETON HALL LEGIS. J. 285, 290 (2000) (estimating that standard forms account for more than 99 percent of all contracts); Robert W. Gomulkiewicz, *The License Is the Product: Comments on* the *Promise of Article 2B for Software* and *Information Licensing,* 13 BERKELEY TECH. L.J. 891, 895-900 (1998) (noting that standard-form terms make electronic commerce possible).

a mortgage, no one but Bill Gates would ***have*** a credit card or mortgage. Were manufacturers required to negotiate each term in a warranty prior to the sale of an appliance, all televisions would come "as is," without any warranty - or manufacturers would simply stop making televisions. Were cellular telephone providers required to negotiate each term of their contracts on a customer-by-customer basis, there would be no cell phones available for love or money.

Furthermore, even were it the case that some form contracts contain terms that may be insufficiently protective of the rights of consumers, the marketplace is itself more than adequate to correct such abuses. For example, consumer objections to the early-cancellation fees contained in certain cellular telephone contracts has caused several companies to offer plans that may be canceled at any time without a fee (but under which the companies presumably charge more for equipment and/or cellular service). Moreover, even if short-term loans are not available without a requirement that disputes be arbitrated, if enough consumers were to express their desire to have agreements without arbitration provisions, some lender would surely offer it - though, of course, other terms of that no-arbitration loan might differ, as the provider would have to price the loan based on its expected costs, including litigation costs. The marketplace will demonstrate whether consumers are willing to pay higher interest rates or fees in exchange for a loan under which all disputes may be resolved in court or via class-wide arbitration; this Court's intervention is unnecessary to achieve that result.[16]

Accordingly, this Court should clarify that, merely because a business offers a form contract on a uniform basis

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[16] Indeed, any holding that class-arbitration waivers are unenforceable would cause lenders and other businesses to curtail operations in New Jersey to the detriment of consumers who would have fewer choices and incur higher prices.

to all who seek that business's services, such a contract is in no way suspect. Any contrary rule would be disastrous for businesses and consumers.

CONCLUSION

This Court should reemphasize its commitment to the well-established principles of federal and New Jersey law favoring the resolution of disputes through arbitration by clarifying that the arbitration agreements between Muhammad and County Bank are fully enforceable.

Respectfully submitted,

/s/

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DATED: January 17, 2006

SUPREME COURT OF NEW JERSEY

NO. 58,430

JALIYAH MUHAMMAD	:	ON APPEAL FROM THE
	:	SUPERIOR COURT OF
	:	NEW JERSEY,
Plaintiff-Appellant	:	APPELLATE DIVISION
	:	
v.	:	DOCKET NO. A-0558-04T3
	:	
COUNTY BANK OF	:	
REHOBOTH BEACH,	:	
DELAWARE; EASY CASH;	:	
TELECASH; and MAIN	:	
STREET CORPORATION	:	
	:	
Defendants-	:	
Respondents	:	
	:	

SAT BELOW:
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CERTIFICATION OF FILING AND PROOF OF SERVICE

I, the undersigned, hereby certify that on this 17th day of January, 2006, the original and nine (9) copies of an Amicus Brief on behalf of the Chamber of Commerce of the United States of America was filed with the Supreme Court of New Jersey, at the Hughes Justice Complex, 25 West Market Street, Trenton, New Jersey 08625-0970, via hand delivery.

I further certify that on the same date, a true and correct copy of the foregoing was served by overnight mail, postage prepaid, upon the following individuals:

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I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/
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DATED: January 17, 2006